

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.36 OF 2015

1. Ashok Tukaram Kale,
Age : 27 years, occ : agri.,
R/o Chandegaon, Taluka
and District Beed.
2. Hirabai Tukaram Kale
(since deceased)
(Appeal stands abated as against
appellant no.2 vide Court's order
dated 06.04.2022).

Appellants

Versus

The State of Maharashtra

Respondent

Mr. Santosh S. Jadhavar, Advocate for the appellants.
Mr. R.D. Sanap, A.P.P. for respondent – State.

**CORAM : V.K.JADHAV AND
SANDIPKUMAR C. MORE, JJ.**

Reserved on : 01st March, 2022.

Pronounced on : 06th April, 2022.

JUDGMENT (Per Sandipkumar C. More, J.) :

1 The appellants, who are the original accused Nos.1
and 3, have preferred this appeal for assailing the judgment
and order dated 31.12.2014, passed by the learned Sessions

Judge, Beed ((hereinafter referred to as the “trial Court”) in Sessions Case No. 12/2014, whereby they are convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced them to suffer life imprisonment and also to pay fine of Rs. 5,000/- in default, to suffer rigorous imprisonment of one year. Initially, the crime involved in the aforesaid sessions case, was registered against three persons namely appellant No. 1 Ashok Tukaram Kale (husband of the deceased), co-accused Tukaram Kale (father-in-law of the deceased) and appellant No. 2 Hirabai Tukarma Kale (mother-in-law of the deceased). However, the learned trial Court has convicted only the present appellants by acquitting the co-accused -Tukaram Kale (father-in-law of deceased).

However, at the time of pronouncement of this judgment, learned Counsel for the appellants brought it to our notice that present appellant no.2 – Hirabai Tukaram Kale died during pendency of this appeal on 11.05.2021. The learned Counsel for the appellants, till this appeal is finally heard on 01.03.2022, did not disclose the said fact and today,

at the time of pronouncement, he brought the said fact to our notice for the first time, so belatedly. Mr. Tambade, learned Counsel holding for Mr. S. S. Jadhavar, advocate for the appellants, also produced on record copy of the death certificate of appellant no.2 – Hirabai Tukaram Kale. On going through the same, it appears that Hirabai Tukaram Kale i.e. appellant no.2 died on 11.05.2021 and her death is recorded in the Register of Births and deaths of the concerned department on 30.06.2021. We, therefore, found it proper to pass an order of abatement of the present appeal against appellant no.2 – Hirabai Tukaram Kale, separately on today itself.

2 Background facts of the prosecution case are as under:

Appellant No. 1 got married with one Rajashree on 3rd June 2013 and it was an arranged marriage. After the marriage, Rajashree started residing with the appellants and father-in-law at village Chandegaon. During the cohabitation, deceased appellant No. 2 had telephonically made complaint

against Rajashree about her misbehaviour to her father i.e. PW-1 Chhagan. She had also talked arrogantly with Chhagan, but he remained quite and also gave understanding to his daughter Rajashree.

3 On 02.10.2013, Rajashree had asked her husband i.e. appellant No. 1 to bring her a pair of chappals. However, at that time, deceased appellant No. 2 i.e. the mother-in-law of Rajashree made sarcastic remark that her father will provide her chappals as he was so rich. On the said remark, there was quarrel between Rajashree and deceased appellant No. 2. Since deceased appellant No.2 had driven out Rajashree from the house in the said quarrel, she in fit of anger had gone to her aunt Parigabai at Chausala village. On 03.12.02013, when her cousin maternal uncle was taking her to paternal house at Yewatwadi village at about 8.00 a.m., the appellants along with some villagers and also father-in-law of Rajashree came there and on request took her against her will to matrimonial house. Thereafter on the said day and also on the subsequent day i.e. on 04.10.2013 appellant No.1 beat her

heavily in the night by saying that where she had gone. On 04.10.2013 itself at about 9.30 p.m., when Rajashree slept after having been beaten by appellant No.1, at about 12.00 in the midnight, appellant No.1 woke her up and again started quarreling with her as to with whom she had gone. On hearing the said quarrel father-in-law Tukaram and deceased appellant No.2 also came there and all three of them started quarreling with her. When out of rage, she expressed desire to commit suicide, the appellants told her that there was no need to die, but they would set her ablaze. By saying so, appellant No.1 brought kerosene can from the adjacent room and her in-laws dragged her to another room. Then appellant No. 1 poured kerosene on her person and deceased appellant No.2 put ignited matchstick on her person. Rajashree started shouting as her clothes caught fire. In the said incident, her entire body sustained burn injuries. Thereafter her father-in-law extinguished her fire by pouring water on her. Thereafter the appellants and her father-in-law took her to Government Hospital, Neknoor initially in an auto-rickshaw of her cousin brother-in-law Ramesh. After having primary treatment

there, she was brought to Government Hospital, Beed in the ambulance and got admitted there.

4 Thereafter one Police Naik Ramesh Totewad (DW-1) attached to Police Chowki of Civil Hospital, Beed received M.L.C. from burn ward, and therefore, he made contact with Dr. Wagh (DW-3) for recording the statement of Rajashree. As Dr. Wagh certified about the fitness of Rajashree for giving statement, Police Naik Ramesh Totewad recorded her statement (Exh.59). At that time, Rajashree had told that she herself poured kerosene on her person and set her ablaze. She further stated that the appellants, who were in the adjoining room, came there and doused her fire with the help of water. Then on 05.10.2013 when A.P.I. of Police Station, Neknoor namely Buddhiraj Dnyanoba Sukale (PW-6) had gone to Beed, he received message from Neknoor Police Station that one burnt patient was admitted in the Civil Hospital, Beed and her dying declaration was to be recorded. He immediately visited the said hospital and met Dr. Sanap (PW-5) and after getting certificate from the said Doctor about the fit condition of Rajashree for giving statement, he recorded

her statement. At that time Rajashree disclosed that at about 12.00 in the midnight of the previous day appellant No.1 i.e. her husband quarreled with her on account of her leaving the house on 02.10.2013. At that time, deceased appellant No.2 along with her husband Tukaram also came there and both of them also started quarreling with her. When she expressed before them that why she should not kill herself, appellant No. 1 stated that he himself would kill her instead of she committing suicide. Appellant No.1 then brought kerosene can whereas deceased appellant No.2 and her husband took her in another room where appellant No. 1 poured kerosene on her person. Thereafter deceased appellant No. 2 put ignited match stick on her person and set her ablaze. The said statement is exhibited as Exh.40-B. On the basis of the said statement-cum-dying declaration, Police Station Neknoor registered Crime No. 147/2013 against the appellants and father-in-law of Rajashree. After recording the statement of deceased Rajashree, A.P.I. Sukale (PW-6) had also issued a letter to Tahasildar, Beed for recording her dying declaration. Accordingly, one Abhay Devidas Mhaske i.e. Naib Tahasildar

(PW-3) also recorded dying declaration of Rajashree after securing the opinion from on duty Medical Officer Shri Jogdand about the fit and conscious condition of Rajashree. The said dying declaration is at Exh. 32 wherein Rajashree stated similar to her dying declaration (Exh.40-B), as recorded by PW-6 A.P.I. Sukale.

5 Thereafter PW-7 P.S.I. Bajarang Ganpatrao Malwade of Neknoor Police Station took over the investigation of the instant crime and collected dying declaration recorded by A.P.I. Sukale and also copy of F.I.R. He then visited the spot of incident at Chandegaon village along with staff and prepared spot panchnama in presence of panch witnesses. He also found one plastic can without lid, match box and pieces of burnt saree. He seized those articles. He also noticed that there were signs of burning in one room wherein ceiling fan was there with bent blade. The spot panchnama is at Exh.18. On the same day i.e. on 05.10.2013, he arrested the appellants and other accused and recorded statements of witnesses. Rajashree died on 10.10.2013 while taking the treatment, and therefore, offence under Section 302 of I.P.C.

was added in the instant crime. PW-7 P.S.I. Malwade then forwarded the seized muddemal articles to Chemical Analyzer with covering letter (Exh.47). He then received inquest panchnama, *post mortem* notes, death certificate and after completion of investigation, he filed charge sheet against the appellants and other accused.

6 The concerned Magistrate committed the case to the Sessions Court, Beed and when the appellants along with other accused appeared before the trial Court, charge as per Exh.10 under Section 302 read with Section 34 of I.P.C. was framed against them. The appellants denied the said charge and claimed for trial. Defence of the appellants, as revealed from the manner of cross-examination and their statements under Section 313 of the Code of Criminal Procedure, was that deceased Rajashree was unhappy and was not willing to reside in the village, and therefore, she herself committed suicide and they were falsely implicated in the crime. Learned trial Court thereafter proceeded with the case and convicted the appellants as aforesaid. Hence, this appeal.

7 We have heard submissions advanced by the learned Counsel for the appellants as well as learned A.P.P.

8 Learned Counsel for the appellants vehemently submits that the case of prosecution is entirely based upon multiple dying declarations of deceased Rajashree. However, despite there being three dying declarations namely Exhibit-32, Exhibit-40-B and Exh.59, the learned trial Court believed only dying declarations Exhibit. 32 and 40-B which are favourable to the prosecution. He further submits that the dying declarations Exhibits. 32 and 40-B suffer from material contradictions and they are not in proper format. Further, there are material contradictions between the oral dying declarations which have come on record in the evidence of PW-1 Chhagan i.e. the father of deceased and PW-2 Parigabai i.e. the aunt of deceased. According to learned Counsel for the appellants, the prosecution intentionally did not examine the witnesses in respect of dying declaration at Exhibit-59 wherein deceased Rajashree had in fact stated about committing suicide. He further submits that the conduct of

the appellants and other accused of taking the deceased in burnt condition to the hospital itself suggests that they were innocent. He also submits that the dying declarations Exhibits- 32 and 40-B relied upon by the learned trial Court for recording conviction against the appellants were the result of tutoring, since at the relevant time, all the close relatives of Rajashree were present there. With these submissions, learned Counsel for the appellants submits that the trial Court ought to have given benefit of doubt to the appellants. As such, he prayed for setting aside the impugned judgment and order and prayed that the appeal be allowed. Besides the oral submissions, learned Counsel for the appellants also relied on the following judgments :

- (i) Bapu (Nandu) Prabhu Koli @ Raju vs. State of Maharashtra, 2018 DGLS (Bom.) 774.**
- (ii) Sunita Suresh Gaikwad vs. State of Maharashtra 2018 DGLS (Bom.) 2118**
- (iii) Navnath Gorakh Kamble (Lohar) vs. State of Maharashtra, 2018 DGLS (Bom.) 1626**

(iv) **Anita Bholanath Wanjari vs. State of Maharashtra**
2018 DGLS (Bom.) 1602.

(v) **Navlabai Gurubasappa Khajure and others vs.**
State of Maharashtra, 2019 DGLS (Bom.) 155.

9 On the contrary, learned A.P.P. supported the impugned judgment and submitted that the circumstantial evidence is in corroboration with the dying declarations Exhibits-32 and 40-B wherein deceased Rajashree held the appellants responsible for setting her ablaze. He further submitted that the aforesaid dying declarations were in fact recorded by the concerned officials by taking all the precautions, and therefore, the learned trial Court rightly believed the same. Learned A.P.P. also relied upon the judgment of this Court (**Coram : V.K. Jadhav and Sandipkmar C. More, JJ.**) in Criminal Appeal No. 614/2014 wherein the judgments of Hon'ble Apex Court in the cases of **Laxman Vs. State of Maharashtra**, (2002) 6 SCC 710; and in the case of **Purshottam Chopra & another Vs. State (Govt. of NCT Delhi)**, 2020 AIR (SC) 476 are referred. Ultimately the learned A.P.P. prayed for dismissal of the appeal.

10 We have carefully gone through the entire evidence on record along with the impugned judgment. We have also considered rival submissions of learned Counsel for appellants as well as learned A. P. P.

11 On perusal of the entire material on record, it appears that deceased Rajashree married with appellant no.1 – Ashok on 03.06.2013 and started residing with him at Chandegaon. It is not disputed that Rajashree was residing with appellants and co-accused Tukaram Bhikaji Kale i.e. her father-in-law who has been acquitted by the learned trial Court. Further, it appears that in the intervening night between 04.10.2013 and 05.10.2013, at about 24.00 hours in the midnight, the incident took place wherein Rajashree sustained 93% burn injuries and subsequently died because of the same on 10.10.2013. The prosecution is claiming that the appellants and co-accused Tukaram set her ablaze at the time of the incident as she had gone to her aunt's house at Chousala on 02.10.2013 due to alleged insulting behaviour of

deceased appellant no.2. On the contrary, it is the defence of the appellants that deceased Rajashree was not happy as she had to live in village and since her father Chagan Bansi Adagale i.e. P. W. 1 did not stand by her side and sent her back to matrimonial house against her will, she herself committed suicide by pouring kerosene on her person. The aforesaid respective contentions of prosecution as well as from the side of appellants have come on record in the evidence of P. W. 1 and P.W. 2, namely father and aunt of deceased Rajashree respectively and also in the evidence of D. W. 1 Uttam Waghmare who happened to be the mediator in arranging marriage of Rajashree with appellant no.1.

12 It is claimed by the prosecution that on 02.10.2013, Rajashree had requested appellant no.1 to bring a pair of chappals for her from the weekly market but at that time, deceased appellant no.2 made a sarcastic remark that Rajashree's father would bring chappals for her being a rich person. Thereafter Rajashree left the house on that day angrily and went to her aunt Parigabai Sandipan Sonawane

at Chousala. On perusal of the evidence of P. W. 2 Parigabai, it appears that after being insulted at the hands of deceased appellant no.2, Rajashree came to her and on making inquiry, she told P. W. 2 Parigabai about the sarcastic remark of deceased appellant no.2. Rajashree had also told Parigabai that since deceased appellant no.2 dragged her out of the house, she left the house and came at Chousalala. It is also stated by P. W. 2 Parigabai that in the evening at about 7.00 p.m., on that day, when she made a contact with appellant no.1 and informed him that Rajashree being at her house, appellant no.1 replied angrily and refused to come to take Rajashree back to his house. On the next day i.e. on 03.10.2013, her brother i.e. P. W. 1 visited place of her work at about 1.00 p.m. and at that time, appellants and co-accused Tukaram along with D. W. No.1 Uttam Waghmare had also come nearby the bus stand of Chousala. Thereafter a meeting among them was held in the presence of Rajashree and at that time, Rajashree was not willing to go to her matrimonial house at Chandegaon with the appellants. However, P. W. 1 and P. W. 2 somehow convinced Rajashree to go back to her

husband and she went unwillingly with appellants and co-accused Tukaram. Thereafter P. W. 2 - Parigabai received a phone call from her brother i.e. P. W. Chagan and accordingly she went to Civil Hospital, Beed where Rajashree was admitted due to sustaining burn injuries. P. W. 2 Parigabai has claimed that Rajashree told her that the appellants and co-accused Tukaram had in fact set her ablaze.

13 On perusal of the evidence of P. W. 1 – Chhagan i.e. father of Rajashree, it appears that after marriage, at the time of Panchami, Rajashree had resided at his house for two days and thereafter deceased appellant no.2 made a phone call to him and complained about the misbehaviour of his daughter Rajashree. When he tried to give understanding to his daughter Rajashree., on the cell phone itself, to behave properly with her in-laws, at the relevant time, deceased appellant no.2 arrogantly talked with him in filthy language. The evidence of P. W. 1 further reveals that on 02.10.2013, P. W. 2 – Parigabai i.e. his sister told him that Rajashree had come to her house at Chousala due to dispute with deceased appellant no.2. On the next day, at about 11.00 a.m. to

12.00 noon, he went to Chousala along with relatives. When he reached to the S. T. bus stand at Chousala, P. W. 2 and her husband also reached there. At the same time, appellants along with co-accused Tukaram and D. W. 1 Uttam Waghmare had also reached there. P. W. 1 has stated that thereafter in-laws of Rajashree had asked him to take Rajashree with them as she left their house in the fit of anger. Then P. W. 1 apologised to appellants about such behaviour of Rajashree. By that time, Rajashree had also reached there and on making inquiry, Rajashree told about the incident of buying pair of chappals for her from the weekly market. Then P. W. 1 somehow convinced Rajashree and also requested the appellants and co-accused Tukaram to take her back for cohabitation. P. W. 1 has further deposed that in the same week at about 6.00 a.m. on friday, he received a phone call from one Parmeshwar Ashruba who informed him that Rajashree was burnt and admitted to Civil Hospital, Beed. When he went to Civil Hospital, Beed at about 8.00 a.m., along with his wife and inquired with Rajashree, she told him that she was assaulted by appellant no.1 in the previous

night and at that time, deceased appellant no.2 poured kerosene on her person and appellant no.1 then set her on fire with the help of ignited matchstick. As such, P. W. 1 and P. W. 2 both have narrated as to how appellants set her ablaze.

14 To counter the allegations of P. W. 1 and P. W. 2, the appellants, on their behalf, have examined D. W. 1 Uttam Sonaji Waghmare who was mediator in the marriage of appellant no.1 and deceased Rajashree. According to him, Rajashree was not happy as she had to reside in village place like Chandegaon and she wanted appellant no.1 to join service in city area. D. W. 1 has also stated that out of the said frustration, Rajashree had also tried to end her life by consuming pills prescribed for deceased appellant no.2 and had become serious. He further stated that after the incident regarding buying pair of chappals, he along with appellants had gone to Chousala where Rajashree had gone and at that time, P. W. 1 Chagan i.e. father of Rajashree blamed her and even slapped her twice. P. W.1 had also raised stone on her

and forcefully sent her to the house of appellants for cohabitation. According to D. W. 1 – Uttam Waghmare, Rajashree herself had committed suicide after feeling dejected with the behaviour of her father i.e. P. W. 1 since she was asked to go to the house of appellants against her will.

15 Thus, two versions are brought on record as regards the death of Rajashree. The prosecution has claimed that the appellants killed Rajashree and on the other hand, it is the defence of appellants that Rajashree herself committed suicide.

16 It is significant to note that both the witnesses, namely P. W. 1 and P. W. 2 have stated about narration by deceased when she was in the hospital, which indicates that the appellants had set her ablaze. These narrations can be treated as oral dying declarations. However, as per the evidence of P. W. 1, Rajashree told him that her mother-in-law i.e. deceased appellant no.2 poured kerosene on her person and appellant no.1 set her ablaze. On the contrary, P. W. 2 –

Parigabai claimed that Rajashree told her that appellants and co-accused Tukaram had in fact set her ablaze. However, there is nothing in the evidence of P. W. 2 about the specific role played by the appellants and co-accused Tukaram while setting Rajashree ablaze.

17 Besides these oral dying declarations, there are three other dying declarations in written form available on record. The prosecution has adduced evidence in respect of two dying declarations, which are at Exhibit-32 and Exhibit-40B wherein deceased Rajashree had blamed appellants for the incident of burning. On the contrary, dying declaration at Exhibit-59 has been brought on record from the side of appellants with the help of defence witnesses. It is significant to note that the dying declaration at Exhibit-59, brought on record by the side of appellants, speaks about commission of suicide by Rajashree after pouring kerosene on herself and then setting her ablaze.

18 It is important to note that the learned trial Court,

while convicting appellant no.1 and deceased appellant no. 2, as aforesaid, has relied upon the dying declarations at Exhibit-32 and Exhibit-40B and ignored the dying declaration at Exhibit-59. The learned Counsel for the appellants vehemently submitted that all these three dying declarations were recorded by independent persons according to procedure and after confirming fit condition of deceased Rajashree through the Medical Officers and, therefore, when the same procedure is adopted for recording all these three dying declarations, one cannot make any discrimination as to which dying declaration is to be believed and which is to be discarded. Therefore, we are under an obligation to scrutinise all these 3 dying declarations minutely to ascertain the truth. We have already stated herein above as to which dying declarations support the prosecution story. The dying declarations at Exhibit-32 and Exhibit-40B consistently speak that appellant no.1 poured kerosene on the person of Rajashree and deceased appellant no.2, with the help of ignited matchstick, set her ablaze. On the contrary, dying declaration at Exhibit-59 speaks about commission of suicide

by deceased herself. Therefore, it is to be decided on which dying declaration, we should rely upon.

19 So far as dying declaration at Exhibit-32 is concerned, it is in fact third in time, recorded by P. W. 3 – Abhay Devidas Maske, then Naib Tahsildar at about 02.30 p.m. on 05.10.2013. Further, at the time of recording the said dying declaration at Exhibit-32, P. W. 4 Dr. Jogdand had certified about fit condition of deceased Rajashree. Therefore, we have to consider the evidence of P. W. 3 as well as P. W. 4 jointly in respect of the dying declaration at Exhibit-32. On perusal of evidence of P. W. 3 – Naib Tahsildar Maske, it is evident that after receiving letter on 05.10.2013 from Neknoor Police Station, he went to record dying declaration of Rajashree in Civil Hospital, Beed and met duty Medical Officer Dr. Jogdand i.e. P.W.4. When he went to Burnt Patients' ward, Rajashree was found surrounded with her relatives. After removing those relatives, P. W. 4 Dr. Jogdand examined Rajashree and informed him that she was conscious and fit to give statement. Accordingly, P. W. 4 made

endorsement on the top portion of the paper about the condition of Rajashree under his signature. Thereafter P. W. 3 – Naib Tahsildar Maske also confirmed himself by asking 2/3 formal questions to Rajashree to ascertain her fitness to give statement. Then he started recording dying declaration Exhibit-32, as narrated by her in his own handwriting. He has deposed that on completion of such recording, he read over contents to her and she accepted the same to be true. Then he obtained thumb impression of Rajashree over the said dying declaration and also put his signature. Thereafter P. W. 4 Dr. Jogdand made an endorsement about the condition of Rajashree. It appears that Dr. Jogdand i.e. P. W. 4 has also corroborated the version of P. W. 3 – Naib Tahsildar maske in respect of recording of dying declaration Exhibit-32 and has deposed accordingly. However, in the cross-examination, P. W. 3- Naib Tahsildar Maske has given an admission that it was not mentioned by him in the dying declaration Exhibit-32 that it was read over to the patient. Further, he was also unable to tell the questions which he had put to the patient Rajashree while recording the dying

declaration. On bare perusal of dying declaration Exhibit-32, it is revealed that it is not in question and answer form and also not in prescribed format which the Executive Magistrates normally use but, it appears to be recorded as if police records statement of witness under Section 161 of the Code of Criminal Procedure. It is also not mentioned that the said dying declaration was read over to Rajashree.

20 So far as dying declaration Exhibit-40B is concerned, it has been recorded earlier to recording of dying declaration at Exhibit-32, at about 11.30 a.m. on 05.10.2013 by A. P. I. Sukale of Neknoor Police Station i.e. P. W. 6. Further, it appears that P. W. 5 – Dr. Pradeep Zumbarrao Sanap was the on duty Medical Officer at Civil Hospital, Beed at the time of recording of this dying declaration Exhibit-40B. This dying declaration appears to be second in time. On going through the evidence of A. P. I. Sukale i.e. P. W. 6, it reveals that he received message from Neknoor Police Station on 05.10.2013 about admission of Rajashree in Burnt Patients' Ward at Civil Hospital, Beed and that her dying declaration was to be recorded. He visited said hospital and

met Dr. Sanap i.e. P. W. 5, who was the on duty Medical Officer, at the relevant time. He issued letter to P. W. 5 Dr. Sanap for confirming fitness of Rajashree for giving statement. Then both of them went to Burnt Patients' Ward and at that time, there were many persons around Rajashree. The Nurse removed all those persons from the ward and P. W. 5 Dr. Sanap examined the patient and made an endorsement on the paper on which dying declaration was to be recorded, that she was fit to give statement. According to A. P. I. Sukale, Rajashree was totally burnt but she stated him as per the prosecution story by making specific allegations against the appellants. Further, it is deposed by A. P. I. Sukale that on completion of recording dying declaration Exhibit-40B, he read over the same to Rajashree who accepted its correctness. Then he obtained right hand thumb impression of Rajashree below the statement. Even P. W. 5 Dr. Sanap also put his endorsement on the said dying declaration to the effect that during recording of the same, Rajashree was conscious. On going through the cross-examination of this witness, nothing adverse has come on record except the admission from P. W. 6

A. P. I. Sukale that earlier he had recorded some dying declarations in question and answer form. P. W. 5 Dr. Sanap, who had put an endorsement on this dying declaration Exhibit-40B, has also corroborated P. W. 6 A. P. I. Sukale in respect of making endorsement on the said dying declaration about the fit condition of patient Rajashree. On perusal of the said dying declaration at Exhibit-40B, it appears that there are endorsements of P. W. 5 Dr. Sanap at the top as well as bottom of it. This dying declaration also supports the prosecution story. However, like the dying declaration Exhibit-32, this dying declaration is also not in question and answer form and crime against appellants and co-accused appears to be registered on the basis of this dying declaration.

21 So far as another dying declaration of Rajashree, as per Exhibit-59 is concerned, the same is not proved by the prosecution witnesses but it is proved by defence witnesses, namely D. W. 2 Ramesh Devidas Totewad, who was on duty Police Naik at the Police Chowki in Civil Hospital, Beed, at the relevant time. Further, it appears that when he recorded the

said statement, D. W. 3 Dr. Chandrakant Sheshrao Wagh was the on duty Medical Officer, at the relevant time. On going through the evidence of D. W. 2 Police Naik Totewad, it reveals that dying declaration Exhibit-59 was recorded immediately after admission of Rajashree in the Civil Hospital, Beed at about 3.00 a.m. on 05.10.2013 i. e. in the early morning. Further, this dying declaration is the first dying declaration of deceased Rajashree. D. W. 2 Police Naik Totewad has deposed that when he was attached to Police Chowki at Civil Hospital, Beed on 05.10.2013, he received MLC in respect of admission of Rajashree in burnt condition in the said hospital. Accordingly, he took Dr. Wagh i.e. D. W. 3 at about 3.00 a.m. to Burnt Patients' Ward to ascertain whether Rajashree was conscious and fit to give statement. Accordingly, when D. W. 3 Dr. Wagh examined Rajashree, he found her in fit condition to give statement. Then, D. W. 2 Totewad recorded statement of Rajashree as per Exhibit-59 wherein she told about committing suicide by pouring kerosene on herself and then setting her ablaze. Thus, the dying declaration Exhibit-59 is telling us a complete different story than the story of

prosecution. D. W. 2 Totewad has further deposed that after completion of recording of dying declaration Exhibit-59 of Rajashree, he obtained her foot thumb impression on the same as both the hands of Rajashree were burnt. According to D. W. 2 Totewad, Rajashree was not having any complaint against anybody for sustaining those burn injuries. This witness has also deposed that when he read over the contents of the statement to her, Rajashree accepted the same to be true. Further, this witness has also deposed about the endorsements made by Dr. Wagh i.e. D. W. 3 about the fit condition of Rajashree before and after recording of the said Dying declaration. In the cross-examination, D. W. 2 Police Naik Totewad has admitted that even on asking Rajashree as to how the incident had occurred, she did not state any reason for the same. Further, it is also admitted by him that it was not specifically mentioned in the dying declaration Exhibit-59 that patient Rajashree had given the statement on her own. However, he has denied flatly the suggestion wherein it was put to him that dying declaration Exhibit-59 was not a voluntary statement of Rajashree and it was

tutored at the instance of appellants. The evidence of D. W. 3 Dr. Wagh also corroborates version of D. W. 2 – Police Naik Totewad. D. W. 3 has specifically stated in his evidence that before and after recording of dying declaration Exhibit-59, he had examined patient Rajashree and she was found conscious and fit to give statement. On perusal of said dying declaration Exhibit-59, it is clearly evident that there is an endorsement of Dr. Wagh at the top of it mentioning that “*the patient was conscious to give statement*” and at the bottom, “*patient was conscious during recording of the statement*”. In the cross-examination, this witness has admitted that in the endorsement made on the top of the said dying declaration, the time was initially written by him as “03-00 to 03-30 a.m.” and thereafter the portion “to 03.30” was scored off.

22 Thus, on going through all these three dying declarations, it appears that dying declaration Exhibit-59 was the first dying declaration of Rajashree wherein she had stated that she herself committed suicide. On the contrary, the dying declaration Exhibit-40B appears to be second in

time and dying declaration Exhibit-32, which is the last dying declaration of Rajashree, indicate that Rajashree had stated therein about setting her ablaze by the appellants. It is significant to note that the learned trial Court has in fact believed the two subsequent dying declarations i.e. Exhibit-40B and Exhibit-32 and ignored the dying declaration Exhibit-59 observing that it was clouded with doubtful circumstances.

23 Learned Counsel for the appellants has heavily relied on the judgments as mentioned above and claimed that though dying declarations at Exhibit-40B and Exhibit-32 also suffers from material defects, still the same were believed when the dying declaration Exhibit-59, stating a contrary story, was also on record.

24 In the 1st judgment in the case of **Bapu (Nandu) Prabhu Koli @ Raju vs. State of Maharashtra, 2018 DGLS (Bom.) 774**, this Court has set aside the conviction of the appellant accused by relying upon the history given to the

Medical Officer who attended the victim immediately, wherein she had stated that she herself poured kerosene on her person and by disbelieving the dying declaration wherein it was stated that the accused had set her on fire. It further appears that this Court disbelieved the said dying declaration because it was found difficult to believe the fact that she was fully conscious and well oriented while giving said statement even after sustaining 88% burn injuries.

25 In the second judgment in the case of **Sunita Suresh Gaikwad vs. State of Maharashtra**, 2018 DGLS (Bom.) 2118, this Court has set aside the conviction of accused by refusing to believe the dying declarations on record for want of other corroborative piece of evidence in the form of material witnesses.

26 In the third judgment in the case of **Navnath Gorakh Kamble (Lohar) vs. State of Maharashtra**, 2018 DGLS (Bom.) 1626, this Court has converted the conviction of the appellant-accused from Section 302 IPC into conviction under

Section 304-II IPC, as it was found that the incident of setting the victim ablaze took place in the hit of passion. It further appears from the said judgment that there were two consistent dying declarations on record. However, in the present case, there are three dying declarations on record, out of which two dying declarations are supporting the prosecution story and the other gives clean chit to the appellants-accused. As such, these observations are not helpful to the appellant-accused.

27 So far as 4th judgment in the case of **Anita Bholanath Wanjari vs. State of Maharashtra**, 2018 DGLS (Bom.) 1602, is concerned, this Court has discussed at length as to how the dying declarations are to be scrutinised with great care and caution and what are the things need to be considered for believing the dying declarations. Ultimately, this Court, in the said judgment, has refused to believe the three dying declarations in the said case, as the Doctor, who put an endorsement on the dying declarations, was not examined. Moreover, it was also held that the Magistrate

recording one of those dying declarations did not satisfy himself, whether the patient was in a fit state of mind to give her statement. Further, the dying declarations relied upon by the prosecution were also found inconsistent on material aspects which created a serious doubt about the manner in which the incident had taken place.

28 In the last judgment in the case of **Navlabai Gurubasappa Khajure and others vs. State of Maharashtra**, 2019 DGLS (Bom.) 155, this Court has set aside the conviction of appellants-accused on the ground that the dying declarations on record were found inconsistent with each other.

29 Thus, on carefully going through the aforesaid judgments, it appears that this Court has already observed in what circumstances and in what manner the dying declarations are to be scrutinised, for upholding the conviction or setting aside the same.

30 As against this, the learned A. P. P. has heavily relied on the judgment of this Court in the case of **Janabai Vasant Raut & another Vs. State of Maharashtra** (Criminal Appeal No. 614 of 214) wherein this Court (**Coram: V. K. Jadhav & Sandipkumar C. More, JJ.**) has dismissed the appeal by upholding the conviction of the appellants-accused under Section 302 read with 34 of the Indian Penal Code by believing two consistent dying declarations. However, in the said judgment, this Court has referred so many judgments passed by this Court and the Hon'ble Apex Court regarding as to how and in which manner the dying declarations are to be believed or disbelieved. There are many circumstances mentioned for disbelieving the dying declarations. However, in the case of **Laxman Vs. State of Maharashtra** (2002) 6 SCC 710, the Hon'ble Supreme Court has laid down certain principles, as below:

“Para No. 2 : If there is material on record indicating that the deceased was fully conscious and was capable of making statement then there is no need of endorsement by doctor.

Para Nos. 4 & 5 : Magistrate / person recording statement of the deceased should depose indicating the questions which he had put to the patient and the answers to such questions and only then a satisfaction by the Court could be arrived at and only then need for medical certificate is exempted.

Para No. 3 : Although it is the law that the dying declaration is admissible yet court has to exercise great caution in giving weight to such dying declaration. Dying declaration is a species of evidence and dying declaration stand affected by existence of many other circumstances effecting its truth and correctness.”

Moreover, the Hon’ble Supreme Court has also observed in the said judgment, at para no.3, as follows:

“The justice theory regarding acceptability of a dying declaration is that such declaration is made on extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man

is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses

state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law tht a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular

case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor, the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

31 Further, the Hon’ble Supreme Court, in the case of **Purshottam Chopra and another Vs. State (Govt. of NCT, Delhi)**, 2020 AIR (SC) 476, in reference to its earlier judgment in the case of **Laxman** (*supra*), has made following observations:

“18 The principles relating to admission and acceptability of the statement made by a victim representing the cause of death, usually referred to as a dying declaration, are well settled and a few doubts as regards pre-requisites for acceptability of a

dying declaration were also put at rest by the Constitution Bench of this Court in the case of Laxman Vs. State of Maharashtra : (2002) 6 SCC 710.

18.1 In the said case of Laxman, conviction of the appellant was based on dying declaration of the deceased which was recorded by the Judicial Magistrate. The Session Judge and the High Court found such dying declaration to be truthful, voluntary and trustworthy; and recorded conviction on that basis. In appeal to this Court, it was urged with reference to the decision in Paparambaka Rosamma and Ors. Vs. State of Andhra Pradesh : 1999 CriLJ 4321 that the dying declaration could not have been accepted by the Court to form the sole basis of conviction since certification of the doctor was not to the effect that the patient was in a fit state of mind to make the statement. On the other hand, it was contended on behalf of the State, with reference to the decision in Koli Chunilal Savji and Anr. Vs. State of Gujrat: 1999 CriLJ 4582, that the material on record indicated that the deceased was fully conscious and was capable of making a statement; and his

dying declaration cannot be ignored merely because the doctor had not made the endorsement about his fit state of mind to make the statement. In view of these somewhat discordant notes, the matter came to be referred to the Larger Bench. The Constitution Bench summed up the principles applicable as regards the acceptability of dying declaration in the following words:

“The justice theory regarding acceptability of a dying declaration is that such declaration is made on extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination

are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also most further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most

cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law tht a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor, the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the

voluntary and truthful nature of the declaration can be established otherwise.”

18.2 The Constitution Bench affirmed the view in Koli Chunilal Savji (supra) while holding that Paparambaka Rosamma (supra), was not correctly decided. The Court said:-

“5..... It is indeed a hyper technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in Parambaka Rosamma Vs. State of A. P. (1999) 7 SCC 695 must be held to be not correctly decided and we affirm the law laid down by this Court in Koli Chunilal Savji Vs. State of Gujarat (1999) 9 SCC 562.”

32 Thus, it appears that the observations of Hon’ble Supreme Court, in the aforesaid judgments, in the case of

Laxman and **Purshottam** (*supra*) are material for scrutiny of the dying declarations on record.

33 In the instant case, the first dying declaration undoubtedly is the dying declaration at Exhibit-59 which appears to be recorded at the earliest opportunity at 3.30 a.m., just after admission of Rajashree in Civil Hospital, Beed. However, this dying declaration does not support the prosecution story. It is extremely important to note that it has been recorded by the police officer at the earliest opportunity, after confirming from the doctor on duty that the patient was in fit condition to give statement. On perusal of this statement, it is clearly evident that Rajashree had in fact stated that she herself poured kerosene and committed suicide by setting her ablaze. Moreover, since the said dying declaration was adverse to the prosecution story, it was suppressed by the prosecution by not examining the concerned witnesses, namely D. W. 2 and D. W. 3. On the contrary, it appears that the prosecution has relied upon another dying declarations at Exhibit-40B and Exhibit-32.

However, both these dying declarations are recorded subsequent to the first dying declaration Exhibit-59, one at 11.30 a.m. on 05.10.2013 and another at 02.30 p.m. on the same day. It is also important to note that all these dying declarations are recorded by independent persons who had no acquaintance with either appellant-accused or the relatives of deceased Rajashree. Further, there was no reason for the persons who recorded all these dying declarations to favour one particular party. If doubtful circumstances, as referred in various judgments of this Court, are to be applied to these dying declarations, then the same have to be applied to remaining two dying declarations since they also suffer from some contradictions, as raised by the rival parties.

34 In the first dying declaration Exhibit-59, the prosecution claims that there was no reason mentioned by the deceased as to on what ground she committed suicide and, therefore, the prosecution is claiming the same to be doubtful. The learned A. P. P. also raised doubt in respect of the said dying declaration Exhibit-59 that on the admission

of Rajashree in Civil Hospital, Beed, her relatives were not there initially and only appellants and co-accused were there and therefore, possibility of tutoring cannot be ruled out. Moreover, D. W. 2 – Police Naik Totewad, though stated that he obtained foot thumb impression of deceased Rajashree on the said dying declaration Exhibit-59, but the subsequent dying declarations at Exhibits-40B & 32 are having right hand thumb impressions of deceased Rajashree thereon. However, we cannot single out any particular dying declaration to believe or disbelieve the theory of prosecution since the subsequent dying declarations also suffer from certain *lacunae*, such as the same were not recorded in verbatim or in question and answer form. Moreover, at the time of recording those subsequent dying declarations, which are at Exhibits-40B and 32, it has come on record that when the concerned witnesses had gone to record those dying declarations, deceased Rajashree was surrounded by her close relatives, such as father, mother, aunt and others. Therefore, the same test is required to be applied as that of earlier dying declaration Exhibit-59 in respect of possibility of

tutoring. Further, if an inference can be drawn that the dying declaration Exhibit-59, supporting to the appellants-accused, was tutored by them, then it has to be inferred in similar manner that the subsequent dying declarations were also tutored at the instance of prosecution witnesses. Further, the learned A. P. P. is claiming that the Medical Officers, who were present at the time of recording of dying declarations Exhibits-40B and 32, had made specific endorsements about fit condition of deceased Rajashree at the time of recording, but in respect of dying declaration at Exhibit-59 also, there are similar endorsements made by the concerned Medical Officer on duty at the relevant time about the fit condition of deceased for giving the statement. Even otherwise also, the Hon'ble Supreme Court in the case of **Laxman** and **Purshottam** (*supra*), has observed that there is no need of certification from the Medical Officer at the time of recording dying declaration, but the purpose would be served only if the person, recording such dying declaration satisfies himself about the fit condition of the maker of such dying declaration. Further, there is also no need of any particular format of

recording dying declaration and even though the dying declarations are recorded by the police officers, same can be believed if the same inspire full confidence.

35 In the light of these observations, if we peruse these three dying declarations, then it appears that the first dying declaration Exhibit-59 was in fact recorded by an independent person i.e. Police Naik Totewad, D. W. 2 who was on duty at the relevant time in Police Chowki at Civil Hospital, Beed. Further, certification about fit condition of patient Rajashree was also given by the Medical Officer on duty at the relevant time i.e. D. W. 3 Dr. Wagh. Similarly, the second dying declaration Exhibit-40B was recorded by P. W. 6 A. P. I. Sukale and condition of patient being fit and conscious was certified by the Medical Officer Dr. Sanap i.e. P. W. 5, who was on duty at the relevant time. Similarly, the third dying declaration Exhibit-32 was recorded by P. W. 3 Naib Tahsildar Maske and fit condition of patient Rajashree was certified by P.W. 4 Dr. Jogdand, who was the Medical Officer on duty, at the relevant time. As such, all these three

dying declarations appear to be recorded by independent witnesses and by applying similar procedure. However, the first dying declaration Exhibit-59 puts forward theory of commission of suicide by deceased, whereas, subsequent dying declarations Exhibit-40B and Exhibit-32 put forth theory of commission of crime by the appellants. Therefore, all these three dying declarations suffer from certain doubtful circumstances and reflect two possibilities, firstly, deceased Rajashree had committed suicide or secondly, the appellants-accused had set her ablaze. It is extremely important to note that the prosecution has suppressed the dying declaration at Exhibit-59, which suggests commission of suicide by deceased Rajashree, however, the same has been brought on record by the defence witnesses D. W. 2 and D. W. 3. The evidence of P. W. 1 and P. W. 2, namely father and aunt of deceased, respectively, suggest that the appellants-accused set her ablaze mainly on the ground as to why she left their house and where she had been for two days. On the contrary, evidence of D. W.1 Uttam Waghmare suggests that since the deceased was slapped by her own father at village Chousala

and was forced to go and reside with the appellants-accused, she, being felt insulted, might have committed suicide. However, these are mere possibilities, but when we rely upon all these three dying declarations, without ignoring any particular one dying declaration, it would definitely give rise to different possibilities. On the basis of first dying declaration Exhibit-59, it appears that Rajashree might have committed suicide, however, on the basis of subsequent dying declarations Exhibits-40B and 32, it can be inferred that the appellants-accused might have set her ablaze. Under such circumstances, we have to apply same principles to all these dying declarations since all these dying declarations being recorded by applying the same procedure giving rise to aforesaid two possibilities. Either Rajashree might have committed suicide or she might have burnt by appellants-accused. Under such circumstances, when the truth and falsehood are so entangled with each other that it becomes almost impossible to separate them or to distinguish the same, the benefit has to be given to the appellants-accused. It has been also held in many cases by the various High

Courts and the Hon'ble Supreme Court that when two views are possible, then the view favourable to the accused must be chosen. In the given set of circumstances, we cannot believe all these three dying declarations to be true at the same time and, therefore, the appellant-accused no.1, in our mind, is entitled for benefit of doubt.

36 The learned A. P. P. has also attracted our attention to the circumstantial evidence and submitted that some incriminating articles, such as kerosene can, burnt matchstick and certain pieces of burnt saree have been found on the place of incident. However, presence of such articles on the spot of incident cannot be doubted since the aforesaid three dying declarations have been brought on record two possibilities either of commission of suicide by deceased Rajashree or commission of crime by the appellants-accused. In any such possibility, the articles found on the spot are bound to be there even in case of suicide or in case of committing crime by setting the deceased ablaze. As such, no significance can be given to the presence of such articles, as

mentioned above, on the spot of incident.

37 Thus, on going through the entire material on record and observations of the Hon'ble Supreme Court as well as of this Court, we are of the opinion that the appellant-accused no.1 is entitled for benefit of doubt in the instant case. The approach of learned trial Court in believing the two dying declarations favourable to the prosecution and ignoring the other dying declaration, which is beneficial to the accused, is thus not proper. Therefore, the learned trial Court, in the light of material variance between the dying declaration at Exhibit-59 on one hand and the dying declarations at Exhibits-40B and 32 on the other hand, should have given benefit to the appellants-accused. Under these circumstances, we come to the conclusion that the learned trial Court has not properly appreciated the evidence in respect of three dying declarations and wrongly convicted the appellants-accused.

38 In the result and in the light of aforesaid

discussion, we pass the following order:

(i) Criminal Appeal as against appellant-accused no.2 – Hirabai Tukaram Kale stands abated since, she died during the pendency of this appeal on 11.05.2021.

(ii) Criminal Appeal is hereby allowed to the extent of appellant – accused no. 1 – Ashok Tukaram Kale.

(iii) The judgment and order dated 31.12.2014, passed by the Sessions Judge, Beed in Sessions Case No. 12/2014, convicting the appellant no.1 Ashok Tukaram Kale, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentencing him to suffer life imprisonment and also to pay fine of Rs.5000/-, in default, to suffer rigorous imprisonment for one year, is hereby quashed and set aside.

(ivi) The appellant no.1 - Ashok Tukaram Kale is acquitted of the aforesaid offence under Section 302 read with

Section 34 of the Indian Penal Code.

(v) Fine amount, if deposited as per the impugned judgment and order, be refunded to appellant no.1.

(vi) The appellant no.1 - Ashok Tukaram Kale be set at liberty forthwith, if not required in any other case.

(vii) The appellant-accused no.1 – Ashok Tukaram Kale shall furnish Personal Bond of Rs.15,000/- (Rs. Fifteen Thousand) and surety in the like amount, under Section 437-A of the Code of Criminal Procedure, before the concerned trial Court at Beed, within one week after his release.

(SANDIPKUMAR C. MORE)
JUDGE

adb

(V.K.JADHAV)
JUDGE